

STATE OF NEW YORK

5646

2021-2022 Regular Sessions

IN SENATE

March 15, 2021

Introduced by Sen. PARKER -- 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 § 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 homeown-
8 er 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 foreclo-
15 sure in the event of default. Often these loans are documented with
16 false and misleading documentation provided by brokers which could easi-
17 ly be determined to be false if checked by the lender. Despite prohibi-
18 tions 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.

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

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

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

9 (i) Engaging in any activity, transaction or course of business in
10 connection with a home improvement contract as described in section
11 seven hundred seventy of the general business law other than with regard
12 to providing services directly connected with the making of a mortgage
13 loan pursuant to the provisions of this article, and only if such
14 services and the fees paid or to be paid in connection therewith are
15 fully disclosed and agreed to in writing by all parties to the trans-
16 action.

17 (j) Charging or paying, either directly or indirectly, a fee in excess
18 of the greater of five hundred dollars or three percent of the mortgage
19 loan for the services rendered by the mortgage broker.

20 (k) The failure of a mortgage banker or exempt organization to assure
21 that no more than a total of six percent of the value of the loan is
22 charged for all services rendered in connection with qualifying for and
23 receiving the loan, provided that any fees which are required to be paid
24 to any public officer for the filing, recording or releasing in any
25 public office of a document securing the loan and the costs of any title
26 insurance or the fees of an attorney voluntarily engaged by and solely
27 representing the interests of the borrower shall not be included within
28 this limit.

29 (l) Charging a fee or anything of value in connection with the refi-
30 nancing of a mortgage loan unless such refinancing is for the purpose of
31 reducing the rate on the mortgage loan in an amount which exceeds the
32 cost of such refinance and which will allow the mortgagor to recover the
33 cost of refinancing the loan within two years of the date of such refi-
34 nance. This provision shall not apply to any additional proceeds in
35 excess of the original loan received by a mortgagor in connection with
36 such refinancing.

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

40 (d) Each mortgage broker, mortgage banker and exempt organization
41 shall provide to each applicant for a mortgage loan at or before the
42 time of application, in writing:

43 (1) A disclosure stating whether the mortgage loan will be retained by
44 the original lender or sold after closing to a third party and if it is
45 to be sold, the name of such third party; and

46 (2) A notice giving the applicant the right to designate a third party
47 to receive copies of all written communications regarding the loan and
48 setting forth the procedure for the applicant to exercise such right.

49 In the event that the disclosure and notices required by this section
50 are not made, the mortgage loan made as a result of such application
51 shall not be sold or transferred nor any action taken to enforce the
52 lender's rights until thirty days after such disclosures are made and
53 acknowledged by the borrower.

54 § 5. Subdivision (d) of section 347 of the banking law, as amended by
55 chapter 22 of the laws of 1990, is amended and a new subdivision (e) is
56 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 of its license pursuant to section four hundred ninety-five of this chapter were it required to obtain such a license[-];

(e) The licensee has engaged in any activity, transaction or course of business or has paid or obtained any money or other thing of value in connection with a home improvement contract as defined in section seven hundred seventy of the general business law without fully disclosing such activity, transaction or course of business and any fees or thing of value paid or to be paid in connection therewith and without having obtained the agreement in writing from all parties to the transaction.

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

3. Any mortgage broker registered under this article who in any way places with or obtains a mortgage loan from a mortgage banker or exempt organization registered under this article shall for all purposes be deemed to be an agent of such banker or exempt organization. Any attempt by any person to void this provision by contract or in any other way shall be void as against public policy.

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

§ 254-e. Certain mortgage provisions prohibited. No mortgage on a loan secured primarily by an interest in real property used as a primary residence by the mortgagor at the time such loan is made shall contain any provision which:

1. allows for a balloon payment; or
2. allows for a payment schedule with regular periodic payments that cause the principal balance to increase; or
3. allows for a provision stating that the interest rate of the loan underlying the mortgage increases after default.

§ 8. The real property actions and proceedings law is amended by adding a new section 1316 to read as follows:

§ 1316. Notice to mortgagor or owner. In all foreclosure actions the mortgagee, upon commencement of a foreclosure proceeding, shall serve the mortgagor at the same time as service of the summons and complaint, a notice in the following form:

"NOTICE TO MORTGAGOR OR OWNER:

YOU HAVE BEEN SERVED WITH A SUMMONS AND COMPLAINT IN A MORTGAGE FORECLOSURE PROCEEDING. IF YOU FAIL TO RESPOND TO THESE IMPORTANT LEGAL DOCUMENTS, YOU MAY LOSE YOUR HOME.

Read this carefully:

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

State and federal laws allow you to defend foreclosure proceedings in certain circumstances and may allow you to prevent a foreclosure on your home. You may be able to offer defenses in this foreclosure proceeding under the following circumstances:

1. If you gave a mortgage on your home as the result of a door to door transaction;
2. If you gave a mortgage on your home in order to finance a home improvement contract;
3. If you did not understand that you were signing a mortgage or were unaware that you had a mortgage on your home;

1 4. If you were on public assistance at the time you gave a mortgage on
2 your home, or were retired and collecting Social Security or SSI and the
3 person who took the mortgage on your home knew you had a fixed income;

4 5. If you were on a limited fixed income at the time you gave the
5 mortgage on your home.

6 Also, your mortgage documents may contain language stating your rights
7 under the contract in cases where you are subject to foreclosure.

8 If you think that you may have a defense to this foreclosure proceed-
9 ing you must act promptly - failure to answer the enclosed summons and
10 complaint will allow the mortgagee's or bank's attorneys to enter a
11 default judgment against you.

12 The front of the summons will tell you how many days you have to
13 answer before the mortgagee or bank may enter a default judgment against
14 you.

15 YOU MAY CONSULT AN ATTORNEY, INCLUDING LEGAL AID IF YOU QUALIFY. The
16 law, (New York Real Property Actions and Proceedings Law Article 13)
17 provides defenses for certain mortgagors and homeowners.

18 The phone numbers and office addresses for your local legal aid
19 offices are contained in your telephone directory. If your phone book
20 has government pages, the phone number and office addresses of your
21 local legal aid offices should be listed there also.

22 ONLY A QUALIFIED ATTORNEY CAN TELL YOU ALL OF YOUR RIGHTS IN THIS
23 PROCEEDING.

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

25 § 9. The real property actions and proceedings law is amended by
26 adding a new section 1317 to read as follows:

27 § 1317. Pleading required. 1. Any complaint served in a proceeding
28 initiated pursuant to this article relating to a mortgage loan which was
29 initiated by a mortgage banker or exempt organization registered pursu-
30 ant to section five hundred ninety-one of the banking law must contain
31 an affirmative allegation, which allegation must be proven to the satis-
32 faction of the court, that such mortgage banker or exempt organization
33 has complied with all of the provisions of section five hundred ninety-
34 five-a of the banking law.

35 2. In any action brought under this article in which the mortgage to
36 be foreclosed arose from the refinancing of a personal residence which
37 was owned by the defendant for more than five years prior to the date of
38 such mortgage it shall be an affirmative defense that: (a) at the time
39 of the loan origination the mortgagor did not have the financial ability
40 to repay the loan and that the financial institution knew or should have
41 known that the mortgagor would not be able to repay such loan; (b) the
42 mortgage broker, mortgage banker or exempt organization which originated
43 the loan violated any provision of section five hundred ninety-five-a of
44 the banking law; or (c) the mortgage document contains a provision
45 prohibited by section two hundred fifty-four-e of the real property law.
46 The court may consider factors including but not limited to the fact
47 that the mortgagor was not employed and unlikely to obtain future
48 employment, the fact that the mortgagor was living on a fixed income or
49 was the recipient of federal or state entitlement of public assistance
50 or that the payments required by such mortgage loan, together with the
51 payments required by any other loan secured by the premises to be fore-
52 closed, were more than fifty percent of the mortgagor's after tax month-
53 ly income as of the date of the loan. For purposes of this section, the
54 term financial institution shall include any banking organization, mort-
55 gage broker, mortgage banker or licensed lenders involved in the origi-
56 nation of the mortgage being foreclosed and any assignee or successor of

such person or entity. In any action brought under this article in which any such affirmative defense is proven to the satisfaction of the finder of fact, the court may award reasonable attorney fees to the defendant.

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

(h) A notice to the owner that, in addition to any right otherwise to revoke an offer, the owner may cancel the home improvement contract until midnight of the [~~third~~] fifteenth business day after the day on which the owner has signed an agreement or offer to purchase relating to such contract. Cancellation occurs when written notice of cancellation is given to the home improvement contractor. Notice of cancellation, if given by mail, shall be deemed given when deposited in a mailbox properly addressed and postage prepaid. Notice of cancellation shall be sufficient if it indicates the intention of the owner not to be bound. Notwithstanding the foregoing, this paragraph shall not apply to a transaction in which the owner has initiated the contact and the home improvement is needed to meet a bona fide emergency of the owner, and the owner furnishes the home improvement contractor with a separate dated and signed personal statement in the owner's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the home improvement contract within [~~three~~] fifteen business days. For the purposes of this paragraph the term "owner" shall mean an owner or any representative of an owner.

§ 11. The general business law is amended by adding a new section 771-c to read as follows:

§ 771-c. Responsibilities of home improvement contractors. 1. No home improvement contractor shall engage in any activity, transaction or course of business or pay or receive any fee, payment, money or other thing of value in connection with the financing of a home improvement contract without fully disclosing such activity, transaction or course of business and any fees, payment or other thing of value paid or to be paid in connection therewith and without having obtained the agreement in writing from all parties to the transaction to such activity and the payment therefor.

2. In addition to any right otherwise to revoke a home improvement contract, the buyer may cancel such contract until midnight of the fifteenth day after the home improvement contract was signed by both parties. Cancellation shall occur when written notice of cancellation is given to the home improvement contractor. Notice of cancellation, if given by mail, shall be deemed given when deposited in a mailbox properly addressed and postage prepaid. Notice of cancellation need not take any prescribed form and shall be sufficient if it indicates the intention of the signatory not to be bound. Notwithstanding the foregoing, this subdivision shall not apply to a transaction in which the owner has initiated the contact and the home improvement is needed to meet a bona fide emergency of the owner, and the owner furnishes the home improvement contractor with a separate dated and signed personal statement in the owner's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the home improvement contract within fifteen business days. For the purposes of this subdivision the term "owner" shall mean an owner or any representative of an owner.

3. No home improvement contract shall be enforceable unless at the time it is signed by the homeowner, the home improvement contractor

1 shall furnish to the homeowner a notice containing a statement in
2 substantially the following form:

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

6 § 12. The general obligations law is amended by adding a new section
7 5-338 to read as follows:

8 § 5-338. Certain home equity loan contracts; enforceability. 1. Any
9 loan made in violation of section five hundred ninety-five-a of the
10 banking law shall be unenforceable and no default judgment shall be
11 entered in any action as a result of the alleged default of the defend-
12 ant to make payments pursuant to a loan agreement which arose as the
13 result of the refinance of a personal residence owned by the defendant
14 whether or not secured by a mortgage unless the court makes an affirma-
15 tive finding of fact in writing that the provisions of section five
16 hundred ninety-five-a of the banking law have not been violated.

17 2. In any action brought seeking enforcement of a loan agreement which
18 arose from the refinancing of a personal residence which was owned by
19 the defendant for more than five years prior to the date of such loan it
20 shall be an affirmative defense that: (a) at the time of the loan origi-
21 nation the borrower did not have the financial ability to repay the loan
22 and that the financial institution knew or should have known that the
23 borrower would not be able to repay such loan; (b) the mortgage broker,
24 mortgage banker or exempt organization which originated the loan
25 violated any provision of section five hundred ninety-five-a of the
26 banking law; or (c) any mortgage document signed contemporaneously with
27 the loan contains a provision prohibited by section two hundred fifty-
28 four-e of the real property law. The court may consider factors includ-
29 ing but not limited to the fact that the mortgagor was not employed and
30 unlikely to obtain future employment, the fact that the mortgagor was
31 living on a fixed income or was the recipient of federal or state enti-
32 tlement of public assistance or that the payments required by such loan,
33 together with the payments required by any other loan secured by the
34 premises securing such loan, were more than fifty percent of the borrow-
35 er's after tax monthly income as of the date of the loan. For purposes
36 of this section, the term financial institution shall include any bank-
37 ing organization, mortgage broker, mortgage banker or licensed lender
38 involved in the origination of the loan for which enforcement is sought
39 and any assignee or successor of such person or entity. In any such
40 action in which such affirmative defense is proven to the satisfaction
41 of the finder of fact, the court may award reasonable attorney fees to
42 the defendant.

43 § 13. This act shall take effect on the first of October next succeed-
44 ing the date on which it shall have become a law. Effective immediate-
45 ly, the addition, amendment and/or repeal of any rule or regulation
46 necessary for the implementation of this act on its effective date are
47 authorized to be made on or before such effective date.