



New Yorkers for Responsible Lending
Mortgage Work Group

MEMORANDUM REGARDING

A.2428/S.2143

February 16, 2021

BILL NUMBER: A.2428/ S.2143

SPONSORS: Assembly Member Dinowitz/Senator Kavanagh

TITLE OF BILL: AN ACT to amend Section 595-b of the Banking Law

SUMMARY OF BILL: This bill provides that any person who has been injured by reason of any violation of any such rules, regulations or policies as the superintendent of the Department of Financial Services may promulgate may bring an action in his or her own name; assert a counterclaim; or, if an action is commenced by the mortgagee or anyone acting on its behalf, bring a third party claim, against either the mortgagee and/or the mortgage servicer to enjoin any violations thereof; authorizes damages; makes related provisions.

STATEMENT REGARDING THE BILL: The Mortgage Working Group of New Yorkers for Responsible Lending (NYRL) believes that A.2428/S. 2143 would provide much needed protection for New York homeowners with mortgages who are experiencing financial hardship caused by the coronavirus (COVID-19) pandemic and the associated economic dislocation by ensuring compliance with New York's strong mortgage servicing rules which, without a private right of action to enforce them, are often violated by mortgage servicers with impunity.

NYRL is a statewide coalition established to promote access to fair and affordable financial services and the preservation of assets for all New Yorkers and their communities as a matter of racial and economic justice. NYRL's approximately 160 members include community development financial institutions, community-based organizations, affordable and fair housing

groups, legal services organizations, housing counseling agencies, advocates for senior citizens and community reinvestment, and fair lending and consumer advocacy groups.

As New York continues to grapple with the health and economic implications of the COVID-19 pandemic, many homeowners have experienced staggering losses of income, with mortgage default rates at levels that dwarf the highest rates of default experienced during the peak of the Great Recession in 2009. As with the impacts of the pandemic in general, foreclosures disproportionately impact communities of color, whose rates of mortgage default are nearly double those of the white population.

At-risk homeowners seeking relief from their lenders must interact with the mortgage servicing companies most lenders contract with to administer residential mortgage loans. Those companies are charged with billing and collecting payments from borrowers, crediting borrowers' accounts when payments are made, responding to borrowers' inquiries about their accounts, and working with distressed borrowers seeking assistance when they encounter difficulty paying their mortgages. Borrowers seeking assistance from mortgage servicers might apply for forbearance under a complex maze of federal and state sponsored programs enacted in the wake of the pandemic, or they might seek a loan modification or other relief from the lender in order to avert loss of their homes to foreclosure. This process is known as "loss mitigation."

In accordance with authority given to it by Section 595-b of the Banking Law, the Department of Financial Services has promulgated detailed regulations governing the business of mortgage servicing in New York State, which provide many consumer protections for New York mortgage borrowers. These detailed rules cover the gamut of mortgage servicers' activity, including handling of escrow accounts, crediting of payments, statements of account, fees, borrower complaints and inquiries, prohibited conduct, oversight of third-party providers, transfers of servicing, the loss mitigation process, and affiliated entities. These rules, codified at 3 NYCRR 419 (and colloquially known as Part 419), also impose a duty of good faith and fair dealing applicable to servicers' interactions with mortgage borrowers. These regulations are in many ways parallel to mortgage servicing rules promulgated by the federal Consumer Financial Protection Bureau ("CFPB") pursuant to the federal Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601 *et seq.* (known as "Regulation X").

But in contrast to the federal Regulation X, which is enforceable by a private right of action under RESPA if it is violated, the Part 419 protections are frequently and flagrantly violated by mortgage servicers or the law firms they retain to prosecute foreclosures, who can complacently rely on the absence of an enforcement mechanism for the very borrowers the rules were meant to protect. This bill would rectify this anomalous absence of an enforcement mechanism by specifying that the violation of mortgage servicing regulations promulgated by the Department

of Financial Services are enforceable by borrowers harmed by their violation just as the comparable federal regulations are enforceable.

It would also ensure compliance with the rules by specifying that such compliance is a condition precedent to commencement of an action in court, and it would make clear that lenders hiring mortgage servicing companies to service their loans would also be liable for violations, thereby incentivizing lenders to retain servicers equipped to comply with New York law. The law would protect against efforts to evade compliance by transferring servicing to a new servicing company, by specifying that violations of a prior servicer may nonetheless be asserted as a defense to actions brought to enforce mortgage loans after the transfer of servicing rights to a new servicer. It also protects against attempts to evade these protections by bringing actions for money judgments on the mortgage note, instead of seeking to foreclose on the mortgage lien on the property, as some servicers have done in an attempt to evade other consumer protections, by making the defense available in both foreclosure actions and actions on the note.

The availability of a remedy for borrowers harmed when the servicing regulations are violated would incentivize mortgage servicers to comply with the important consumer protections codified in the servicing rules and would deter servicers from flouting those rules. Just as servicers have internalized the rules implementing RESPA because they know that violations of those rules carry consequences, so too should they be required to respect New York's analogous mortgage servicing rules. The need for a private right of action to enforce New York's servicing rules became all-too apparent during the last presidential administration, during which federal regulators abdicated their consumer protection obligations. With so many New Yorkers contending with lost income and mortgage distress during the ongoing health and economic crisis, ensuring accountability from mortgage servicers and lenders, and incentivizing them to comply with their obligations governing the loss mitigation process under New York law is one of the most important things that government can do to ameliorate the impact of the crisis and to prevent avoidable foreclosures.

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