

TO: All Clients

FROM: Joseph F. Battista, Esq., General Counsel

RE: S8243C, S8428C and the Enactment of Banking Law 9-x

DATE: June 22, 2020

We are writing to advise you regarding bills S8243C and S8428C both of which were signed into law by Governor Cuomo effective immediately and which provide COVID-19 related forbearance relief to mortgagors. S8243C enacts a new statute entitled Banking Law 9-x mandating new COVID-19 forbearance requirements and S8428C simultaneously amends Banking Law 9-x. Significantly, S8243C and S8428C apply to conventional home loans only.

Banking Law 9-x, as enacted by S8243C and amended by S8428, applies to mortgages meeting RPAPL 1304's definition of a "home loan" upon real property, or a co-op, in New York State that is the primary residence of the mortgagor. The covered period is defined as March 7, 2020 until the New York On Pause orders restricting businesses and gatherings have been lifted for the county in which the subject property or co-op is located.

If a mortgagor whose primary residence is encumbered by a qualifying mortgage demonstrates financial hardship during the covered period, the lender must grant a forbearance for one hundred eighty (180) days, with the option for a further extension of up to one hundred eighty (180) days on the condition that the mortgagor demonstrates continued financial hardship. The forbearance may be backdated to March 7, 2020, and credit towards the 180 day requirement will be given for forbearances previously granted pursuant to Executive Order 202.9. The forbearance is subject to the following additional terms:

- Interest shall be waived on the principal for the term of the forbearance; and
- No late fees and penalties may be charged as a result of the forbearance; and
- The mortgagor shall have the option to extend the maturity date of the loan for the length of the period of forbearance and the lender is barred from charging additional interest, penalties or late charges on the forborne payment; and
- The mortgagor shall have the option to re-amortize the arrears accumulated during the forbearance over the remaining term of the loan; and
- If loan modification terms cannot be reasonably agreed upon, the lender must provide as an option the ability to defer the arrears accumulated during the forbearance as a non-interest bearing balloon payable at maturity or payoff; and
- Forbearance relief pursuant to the new requirements may be denied if doing so would endanger the capital liquidity of the institution. If relief is denied, the NYS Department of Financial Services must be notified within five (5) business days of making such determination and the mortgagor advised of the denial and his/her right to file a complaint with the NYS Department of Financial Services.
- No negative credit reporting is permitted for exercising any rights under the statute; and
- Compliance with this bill is a condition precedent to foreclosure.

Importantly, the new Banking Law 9-x(5) exempts loans loan that are made, purchased, insured or securitized by the Federal Government, GSE's, or a federal home loan bank and so <u>do not apply</u> to any FHA, HUD, GNMA, FNMA or FHLMC loans irrespective of the entity servicing the loans. Also exempted are loans made, purchased, insured or securitized by a corporate governmental agency of the state.

Banking Law 9-x(1)(c) also limits the applicability of the requirements to New York regulated banking organizations and New York regulated mortgage servicers. However, it is important to note that the New York State Department of Financial Services effectively deems many entities that service more than twelve (12) loans to be a mortgage servicer requiring registration unless the loan is being serviced by a Federal banking entity. Notably, even operating subsidiaries of national banks and thrifts that engage in mortgage servicing may be required to become registered, so it is important to verify the obligation of a servicer to register with the State.

Impact on Foreclosure Process:

The affidavits supporting motions for either an order of reference or summary judgment will need to be modified to establish either compliance with the forbearance requirements or one of the following exceptions to the forbearance requirements:

- 1) If the loan is FHA, FNMA, Freddie, GNMA or HUD the affidavit will need to include a paragraph attesting that the loan is made, insured, purchased or securitized by the Federal Government or GSE.
- 2) If the plaintiff and servicer are not a New York regulated institutions the affidavit will need to include a paragraph attesting that the plaintiff and servicer are not New York regulated institutions.
- 3) If no mortgagor resides at the subject property as a primary residence the affidavit will need to include a paragraph attesting that the mortgagor(s) does not reside at the property and annex a property inspection report, lease or other documentation demonstrating another primary residence.
- 4) For mortgagor occupied properties with conventional loans we will need confirmation as to whether the mortgagor requested forbearance. If no forbearance was requested, the affidavit will need to attest to the fact that the mortgagor did not request a forbearance. If a forbearance was requested but denied for reasons other than those specified in the foregoing sections 1-3, the affidavit will need to attest to the basis for the denial. If a forbearance was granted, the affidavit will need to annex a copy of the agreement and set forth what option was selected at the end of the forbearance.
- 5) Since compliance is a condition precedent to commencement, we will be updating our first legal templates to reflect compliance with these statutory provisions.

Our office will be providing recommended revisions to existing affidavit templates in the very near future. In the meantime, if you would like to schedule a call to discuss the new forbearance requirements and the impact on the foreclosure process, please feel free to contact me at jbattista@rasboriskin.com or 516-280-7675 ext. 1059.