



2009

## North Carolina Leads Again: Loan Servicing Amendments to the Mortgage Lending Act

Donald C. Lampe

Follow this and additional works at: <http://scholarship.law.unc.edu/ncki>



Part of the [Banking and Finance Law Commons](#)

---

### Recommended Citation

Donald C. Lampe, *North Carolina Leads Again: Loan Servicing Amendments to the Mortgage Lending Act*, 13 N.C. BANKING INST. 247 (2009).

Available at: <http://scholarship.law.unc.edu/ncki/vol13/iss1/13>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Banking Institute by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# **NORTH CAROLINA LEADS AGAIN: LOAN SERVICING AMENDMENTS TO THE MORTGAGE LENDING ACT**

DONALD C. LAMPE\*

## **I. INTRODUCTION**

North Carolina has consistently been a trailblazer on the path to enact comprehensive consumer protection laws, particularly in the field of residential mortgage lending. The North Carolina General Assembly (General Assembly) took its first step in 1999 by enacting the nation's first anti-predatory lending statute.<sup>1</sup> This statute served as a template for enactment of high-cost home loan laws, regulations, and ordinances in over forty jurisdictions.<sup>2</sup> The next step occurred in 2002, when the Mortgage Lending Act became effective.<sup>3</sup> The Mortgage Lending Act gave the North Carolina Commissioner of Banks (Commissioner of Banks) licensing and supervisory authority over mortgage lenders and mortgage brokers for the first time. In 2007, the General Assembly pressed forward with North Carolina's "rate spread home loan" law.<sup>4</sup> This law created a class of "subprime" home loans that could not be made lawfully in North Carolina without adherence to carefully prescribed underwriting procedures. During the same session, the General Assembly enacted a new law criminalizing mortgage fraud<sup>5</sup> and another law limiting the fees

---

\* Partner, Womble Carlyle Sandridge & Rice, PLLC.

1. Act of July 22, 1999, ch. 332, sec. 1-8, 1999 N.C. Sess. Laws 1202.

2. See PHILIP BOND, DAVID K. MUSTO & BILGE YILMAZ, FEDERAL RESERVE BANK OF CLEVELAND, PREDATORY LENDING IN A RATIONAL WORLD 25 n.24 (Feb. 2006), [http://www.clevelandfed.org/research/conferences/2007/October2/bond\\_predatory.pdf](http://www.clevelandfed.org/research/conferences/2007/October2/bond_predatory.pdf).

3. North Carolina Mortgage Lending Act, N.C. GEN. STAT. §§ 53-243.01 to .18 (2007), amended by Act of Aug. 17, 2008, ch. 228, sec. 1-14, 2008 N.C. Sess. Laws \_\_\_\_\_. The Mortgage Lending Act was originally enacted in 2001 and became effective in 2002. *Id.*

4. Act of Aug. 16, 2007, ch. 352, sec. 1-10, 2007. N.C. Sess. Laws 1072.

5. North Carolina Residential Mortgage Fraud Act, ch. 163, sec. 1-2, 2007 N.C.

and terms that mortgage servicers may impose on consumer mortgage borrowers.<sup>6</sup>

The General Assembly's "short session" in 2008 was no different. Lawmakers sought to tackle the rising rate of mortgage defaults and foreclosures in the state, one of the many unfortunate results of the "mortgage crisis." The work of the House Select Committee on Rising Foreclosures energized the legislative debates.<sup>7</sup> Since 2007, this committee has held hearings and conducted deliberations, resulting in the introduction of bills supported by the Commissioner of Banks, the Attorney General, and various consumer and community advocacy groups. At the end of the 2008 session, the General Assembly sent three significant mortgage servicing, default, and foreclosure bills to the Governor for signature.<sup>8</sup> Most importantly, the General Assembly provided \$14 million in appropriations aimed at foreclosure prevention and low-income housing finance.<sup>9</sup> Because of North Carolina's leading role in enacting consumer protection legislation that then serves as a model for other states and the U.S. Congress, these bills have attracted the attention of industry participants, consumer and community activists, and policymakers nationwide.<sup>10</sup> Numerous federal bills, including the comprehensive federal legislation proposed in 2007 to regulate the mortgage industry,

---

Sess. Laws 269.

6. Act of Aug. 16, 2007, ch. 351, sec. 1-6, 2007 N.C. Sess. Laws 1065. This law is part of North Carolina's mortgage statute and is limited to the activities of mortgage servicers. *Id.*

7. N.C. H. SELECT COMM. ON RISING HOME FORECLOSURES, INTERIM REPORT (May 2008) available at <http://worldcat.org/oclc/230801744/viewonline>. See also Foreclosure Assistance Bill Announced, [http://projects.newsobserver.com/under\\_the\\_dome/foreclosure\\_assistance\\_bill\\_announced](http://projects.newsobserver.com/under_the_dome/foreclosure_assistance_bill_announced) (July 1, 2008, 11:47 EST).

8. Emergency Foreclosure Reduction Program, ch. 226, sec. 1-6, 2008 N.C. Sess. Laws \_\_\_\_, Act of Aug. 17, 2008, ch. 228, sec. 1-14, 2008 N.C. Sess. Laws \_\_\_\_, Act of Aug. 17, ch. 227, sec. 1-4, 2008 N.C. Sess. Laws \_\_\_\_ (setting forth minor amendments to the Mortgage Debt Collection and Servicing Act and the high-cost home loan law. Chapter 227 also amends the "rate spread home loan" statute to prohibit indirect mortgage broker compensation. This latter action was controversial, as it prohibited "yield spread premiums" for the first time.).

9. Act of July 16, 2008, ch. 107, sec. 6.9A, 2008 N.C. Sess. Laws \_\_\_\_.

10. See Act of July 22, 1999, ch. 332, sec. 1-8, 1999 N.C. Sess. Laws 1202. The high-cost home loan provisions of Chapter 332 are codified in Chapter 24 of the North Carolina General Statutes. N.C. GEN. STAT. § 24-1.1E (2008). See also Act of Aug. 16, 2007, ch. 352, sec. 1-10, 2007 N.C. Sess. Laws 1072.

House Bill 3221, have been based on North Carolina law.<sup>11</sup> House Bill 3221 was ultimately enacted as part of the Housing and Economic Recovery Act of 2008.<sup>12</sup>

North Carolina's new mortgage loan servicing law, the Servicing Act,<sup>13</sup> amends the Mortgage Lending Act.<sup>14</sup> The Servicing Act is a comprehensive residential mortgage servicing law, containing licensing requirements for "mortgage servicers," conduct proscriptions and prohibitions, and unprecedented default and foreclosure-related provisions. The Servicing Act may be viewed as another step for North Carolina policymakers on the path to providing significant consumer protections, while imposing industry-wide codes of conduct on residential mortgage lending market participants. Taken together with existing North Carolina consumer protection laws, the home loan-related statutes enacted in 2008 arguably create the strongest state law regulatory framework in the country for residential mortgage loan solicitation, origination, securitization and servicing.<sup>15</sup>

This Article will discuss the important aspects of the Servicing Act and its effect on participants in the market of residential mortgage lending. Part II of this Article will describe mortgage servicing and explain why this field was in need of stricter regulation.<sup>16</sup> Part III will discuss the important requirements and prohibitions of the Servicing Act on mortgage servicers.<sup>17</sup> Part III will also explore the Servicing Act's grant of authority to the Commissioner of Banks to delay foreclosure in certain instances.<sup>18</sup>

---

11. HR 3221, 110th Cong. (2008) (enacted).

12. Pub. L. 110-289, 122 Stat. 2654 (2008).

13. Act of Aug. 17, 2008, ch. 228, sec. 1-14, 2008 N.C. Sess. Laws \_\_\_\_.

14. North Carolina Mortgage Lending Act, N.C. GEN. STAT. §§53-243.01 to .18 (2007), amended by Act of Aug. 17, 2008, ch. 228, sec. 1-14, 2008 N.C. Sess. Laws \_\_\_\_.

The Mortgage Lending Act requires licensing of "mortgage lenders," "mortgage brokers" and "loan officers" as defined therein. *Id.*

15. See also Kerry Waldrep, *North Carolina's Emergency Measures to Reduce Home Foreclosures* 13 N.C. Bank. Inst. 453 (2009).

16. See *infra* notes 19-22 and accompanying text.

17. See *infra* notes 36-60 and accompanying text.

18. See *infra* notes 61-66 and accompanying text.

## II. MORTGAGE SERVICING

As the secondary mortgage market expanded, the servicing market followed. Lenders could either sell whole loans, sell the loans but retain the servicing rights, or sell the servicing rights but retain the loans.<sup>19</sup> During the 1980s, there was an emergence in the secondary market of non-agency mortgage securitizations, known as residential mortgage backed securities (RMBS). These products were largely unregulated, except through the Securities and Exchange Commission's disclosure regime. Securitization transactions are inherently disintermediated, with the ultimate owner and holder of the loans being a passive securitization trust. The parties to securitization transactions retain third party loan servicing companies. Servicers of mortgage loans are responsible for collecting the monthly payments made by the borrower, allocating the various elements of the payments, making any necessary adjustments to the payment, accepting early pay-offs, and foreclosing on defaulted borrowers.<sup>20</sup> In exchange for providing these services, the servicer receives a portion of the interest cash flow for the loans it services. Government sponsored entities, such as Fannie Mae and Freddie Mac, set servicing fees for the loans these entities own. Otherwise, if the loan is privately held, the servicing fee is driven by the market. Due to the relative complexity of securitization transactions, servicers must modify their procedures and practices in order to comply with loan pooling and servicing agreements.

As a result of these responsibilities, mortgage servicers ordinarily have a much longer relationship with the borrower than the mortgage lender or broker. In the event of default, borrowers are required to contact the mortgage servicer to discuss loan workout options. The servicing business, however, has become a largely automated operation, scaled to deal primarily with performing loans. Consequently, the servicer may be limited in what options it may offer the borrower, depending on the terms of

---

19. KAREN B. GELERT, SECONDARY MARKET RESIDENTIAL MORTGAGE TRANSACTIONS: BUSINESS AND LEGAL STRATEGIES 1.04[1] (2001).

20. *Id.* at 1.03[3].

the securitization trust. This creates a number of problems when a larger number of borrowers begin to default.

The unprecedented global financial crisis of 2008 was closely tied to the explosive growth, and subsequent deflation, of the residential mortgage market. Many observers, including consumer and community advocates, fixed the blame on “predatory lenders” and looked to state representatives, legislatures and regulators with the question, “Why wasn’t more done to protect homeowners?” Prior to the crisis, many states, including North Carolina, enacted new laws to address the origination activities of mortgage lenders or to enforce existing laws more stringently. In the process, many states realized they had little to no jurisdiction over mortgage servicing activities or mortgage servicers. Due to this lack of jurisdiction, and the fact that borrowers have no control over who services their loan, many states began to regulate mortgage servicing activities.

In addition, the Federal Reserve Board finalized new rules under the federal “Truth in Lending Act” (TILA), which become effective October 1, 2009.<sup>21</sup> The rules prohibit certain servicing practices for closed-end consumer credit transactions secured by a consumer’s principal dwelling. First, the rule prohibits a servicer from failing to credit a payment to a consumer’s account as of the date received. Second, the rule regulates the practice of “pyramiding” late fees by prohibiting a servicer from imposing a late fee on a consumer for making a payment that constitutes the full amount due and is timely, but for a previously assessed late fee. Third, the rule prohibits a servicer from failing to provide an accurate payoff statement within a reasonable time after requested. The Federal Reserve Board, in its comments to the TILA revisions, shared its concerns about “abusive servicing practices,” and noted the “misalignment of incentives between consumers, servicers, and investors.”<sup>22</sup>

---

21. Regulation Z, 73 Fed. Reg. 44,522 (July 30, 2008) (to be codified at 12 C.F.R. pt. 226).

22. Truth in Lending, 73 Fed. Reg. 1672 (proposed Jan. 9, 2008) (to be codified at 12 C.F.R. pt 226).

### III. SERVICING ACT

The Servicing Act, effective on January 1, 2009, was drafted on a blank slate, rather than being based on statutes or regulations from any other jurisdiction. The legislature melded the Servicing Act onto the Mortgage Lending Act. In this way, the General Assembly did not require the creation of a new licensing or oversight infrastructure at the Office of the Commissioner of Banks or other state regulatory body. Rather, the legislature gave the Commissioner of Banks the authority to apply the basic procedures and forms already in place for the licensing and oversight of “mortgage lenders” and “mortgage brokers” to mortgage servicers. Moreover, definitions in the Mortgage Lending Act carry over to the licensure and oversight of “mortgage servicers” and a number of the prohibited practices applicable to mortgage lender and mortgage broker licensees apply to “mortgage servicers.”<sup>23</sup> To date, more than twenty-eight companies have submitted mortgage servicer license applications. North Carolina approved ten of those applications and eighteen are currently in the process of being approved.<sup>24</sup>

#### A. *Definition of “Mortgage Servicer”*

The basic requirement of the Servicing Act is for mortgage servicers to be licensed by Commissioner of Banks under the Mortgage Lending Act.<sup>25</sup> The term “mortgage servicer” is defined in the Servicing Act as a person who directly or indirectly “acts as a mortgage servicer,” or who otherwise meets the definition of “servicer” under the Real Estate Settlement Procedures Act (RESPA) with respect to mortgage loans.<sup>26</sup> The Servicing Act’s

---

23. *See infra* notes 36, 55 and accompanying text.

24. Email from Charlie Fields, Director of Mortgage Division, North Carolina Office of the Commissioner of Banks (Jan. 28, 2009, 04:10 EST) (on file with author).

25. N.C. GEN. STAT. § 53-243.02(a) (2007), amended by Act of Aug. 17, 2008, ch. 228, sec. 2, 2008 N.C. Sess. Laws \_\_\_\_.

26. § 53-243.01(20); *see also* Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(i)(2) & (3) (2007) (“Servicer” is defined as “the person who is responsible for servicing of a loan (including the person who makes or holds the loan if such person services the loan).” “Servicing” is defined as “receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for

definition of to “act as a mortgage servicer” tracks RESPA’s definition of “servicing.”<sup>27</sup>

Under the North Carolina law, to “act as a mortgage servicer” means to engage, whether for another or on one’s own behalf, “in the business of receiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan,” including escrow amounts, and making the “payments of principal and interest” and other payments received from the borrower as “may be required pursuant to the terms of the mortgage loan, the mortgage servicing loan documents or the servicing contract.”<sup>28</sup>

The Mortgage Lending Act defines a “mortgage loan” as “a loan made to a natural person or persons primarily for personal, family or household use,” primarily secured by residential real property located in North Carolina.<sup>29</sup> “Residential real property” is defined as real property located in North Carolina upon which there is located or to be located one or more single-family dwellings or dwelling units.<sup>30</sup> There are no high or low dollar limits in these definitions nor are loan types covered by the definitions otherwise limited. The definition of “mortgage loan” is broad enough to include first and second mortgages, closed and open-end loans (e.g., equity lines of credit) and loans secured by second or vacation homes.

The Servicing Act’s definition of “mortgage servicer” is arguably broader than the RESPA definition. First, the Servicing Act suggests that a party may be a “mortgage servicer” if it “*directly or indirectly*” engages in the conduct described.<sup>31</sup> The North Carolina statute, however, does not set up alternative definitions, but states that the party must “otherwise meet[] the definition of ‘servicer’ in RESPA.”<sup>32</sup> But, the North Carolina

---

escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.”).

27. Cf. 12 U.S.C. § 2605(i)(3) (2007) and § 53-243.01(3).

28. § 53-243.01(3).

29. § 53-243.01(19).

30. § 53-243.01(27).

31. § 53-243.01(20) (emphasis added).

32. *Id.*

definition here adds “with respect to mortgage loans.”<sup>33</sup> Also, the definition of “mortgage loan” in the Mortgage Lending Act is broader than the definition of “federally related mortgage loan” in RESPA.<sup>34</sup> Mortgage servicers and loan holders collecting North Carolina “mortgage loans” must be careful. It is not safe to assume that collecting only mortgage loans other than “federally related mortgage loans” will not trigger the application of the Servicing Act. Furthermore, the Servicing Act’s definition of “mortgage servicer” technically is not consistent with the North Carolina Mortgage Debt Collection and Servicing Act, which covers only RESPA-defined “servicers.”<sup>35</sup>

### *B. Requirements for Mortgage Servicers*

As mentioned above, the main component of the Servicing Act is that it extends the Mortgage Lending Act’s licensure requirements to mortgage servicers.<sup>36</sup> The application, background check, fees, and financial and bonding requirements are the same for “mortgage servicers” as for mortgage bankers and mortgage brokers under existing law. The Servicing Act also subjects mortgage servicers who are required to be licensed to the extensive reporting requirements of the Mortgage Lending Act, including detailed annual reporting. The Office of the

---

33. *Id.*

34. *See* § 53-243.01(19), 12 U.S.C. § 2602(1) (2007).

35. *See* N.C. GEN. STAT. § 45-90(2) (2008).

36. The Servicing Act also contains numerous “technical amendments” to the Mortgage Lending Act that will be binding on new applicants for Mortgage Lending Act licenses and on existing mortgage broker and mortgage banker licensees, including: (i) change in definition of “managing principal” to “qualifying individual”; (ii) prohibition on principal place of business at an individual’s home or residence; (iii) amendment to definition of corporate “control”; (iv) clarification that an “employee” is a W-2 employee; (v) statement that the Mortgage Lending Act also applies to anyone who seeks to avoid the law by “any direct or indirect device, subterfuge, artifice, or pretense whatsoever”; (vi) expansion of crime-related disclosures that must be made in applications and renewals and of criminal activity that may form a basis for license suspension or revocation; (vii) increasing fees for late renewals from \$50 to \$100; (viii) express imposition of examination-related expenses on licensees; and, (ix) expanded the Commissioner of Banks’ authority to suspend licenses quickly if a licensee fails to respond to the Commissioner of Banks’ inquiries related to consumer complaints or if a licensee fails to cooperate with scheduling and conducting examinations or investigations. § 53-243.01, 53-243.02, 53-243.06, 53-243.09, 53-243.12.

Commissioner of Banks issued additional guidance and revised application forms in advance of the January 1, 2009 effective date.<sup>37</sup> Because mortgage servicers ordinarily do not employ “loan officers,” it should not be necessary for individual employees of mortgage servicers to obtain individual “loan officer” licenses. The result could be different if a particular employee, officer, partner, or other individual involved in the business of the mortgage servicer engages in activities within the definition of “loan officer” under the Mortgage Lending Act.<sup>38</sup> For example, if a mortgage servicer employee solicits or offers to solicit a new mortgage loan for a borrower or negotiates the terms of a new mortgage loan, the employee could be subject to licensure as a “loan officer” under the Mortgage Lending Act.<sup>39</sup>

The Mortgage Lending Act specifies certain “exempt” parties who are not required to be licensed. The definition of “exempt person” includes a relatively extensive description of entities and individuals, including government agencies, banks, savings institutions and credit unions (and wholly-owned subsidiaries of such entities), licensed real estate agents, non-profit corporations qualified under Section 501(c)(3) of the Internal Revenue Code, licensed North Carolina attorneys practicing law or as trustees who accept payments related to loan closing, default, foreclosure, loss mitigation or litigation or settlement of a legal dispute or claim related to the loan, and mortgage bankers licensed under the Mortgage Lending Act.<sup>40</sup> This definition is significant because “exempt persons” are not exempt expressly

---

37. See North Carolina Commissioner of Banks, Mortgage Lending Licensing and Compliance Forms, <http://www.nccob.org/NCCOB/Mortgage/FormsFees/default.htm> (last visited Feb. 1, 2008), Letter from North Carolina Commissioner of Banks Office to All Mortgage Lenders and Mortgage Brokers (Sept. 4, 2008) available at <http://www.nccob.org/NR/rdonlyres/94114C7D-97C5-4D40-B7CCEB96E8813D90/0/ServicerBillandRulesSummaryLetter.pdf>.

38. See § 53-243.01(14). A “loan officer” is “individual who, in exchange for compensation as an employee of another person, accepts or offers to accept applications for mortgage loans, or who solicits or offers to solicit a mortgage loan, negotiates the terms or conditions of a mortgage loan, issues mortgage loan commitments or interest rate guarantee agreements to borrowers, whether such acts are done through contact by telephone, by electronic means, by mail, or in person with the borrowers or potential borrowers.” *Id.* The definition of loan officer shall not include any exempt person described in sub-subdivision (12)b of this section. *Id.*

39. *Id.*

40. § 53-243.01(12).

from the statute's enumerated prohibited activities.<sup>41</sup> In addition, even "exempt persons" (including persons involved in the "mortgage-servicing business") are required to file an exemption form with the Commissioner of Banks.<sup>42</sup> Whether or not these provisions are enforceable against federally-chartered institutions, such as national banks and federal savings banks, is open to question under established doctrines of federal preemption. For example, a state banking commissioner is not permitted to require a national bank to obtain a license in order to conduct business in the state.<sup>43</sup> It appears, based on data maintained by the Commissioner of Banks, that financial institutions who otherwise would not be subject to state regulatory oversight nonetheless have filed exemption forms under the Mortgage Lending Act.<sup>44</sup>

The Mortgage Lending Act imposes certain duties on licensed mortgage brokers and persons acting as mortgage brokers under the Mortgage Lending Act. The Servicing Act imposes these affirmative duties on mortgage servicers "licensed or acting under [the Mortgage Lending Act]."<sup>45</sup> The mortgage servicer licensing exemption for licensed mortgage bankers by its terms does not exempt licensed mortgage bankers from these affirmative duties. Moreover, banks, thrifts and credit unions that are "exempt persons" may still be "act[ing] as mortgage servicers" in the ordinary course of collecting home loans.<sup>46</sup> Thus, the requirements appear to apply to any defined mortgage servicing activity engaged in by any party (whether as lender, holder or third party servicer) with respect to North Carolina "mortgage loans." Keeping in mind that these new requirements apply to lenders collecting their own mortgage loans as well as to third-party

---

41. The statute provides that the listed activities are "unlawful for any person in the course of any mortgage loan transaction." § 53-243.11. *See infra* notes 55-60 and accompanying text.

42. § 53-243.15.

43. *Watters v. Wachovia*, 550 U.S. 1 (2007).

44. State of North Carolina Office of the Commissioner of Banks, Licensee Search <https://www.nccob.org/Online/NMLS/LicenseSearch.aspx> (last visited Feb. 1, 2009) (click "Show All Exempt" to see list of financial institutions that have filed exemption forms under the Mortgage Lending Act). As of January, 1, 2009, 580 companies filed notices of exemption. *Id.*

45. *See* § 53-243.10(b).

46. *See* § 53-243.01(3).

servicers, the Servicing Act provides that a mortgage servicer must safeguard and account for any money handled for the borrower, follow reasonable and lawful instructions from the borrower, and act with reasonable skill, care, and diligence.<sup>47</sup> Mortgage servicers must provide to the Commissioner of Banks, upon request, a detailed loan-level report.<sup>48</sup> Significantly, this report must include information on loss mitigation activities, including details on workout arrangements undertaken, and information on foreclosures commenced in North Carolina.<sup>49</sup> The Servicing Act also requires that the mortgage servicer, with its application and renewal and with its supplemental filings with the Commissioner of Banks, file a complete, current schedule of the ranges of costs and fees it charges borrowers for its servicing-related activities.<sup>50</sup>

The mortgage servicer must provide additional written disclosures to the borrower at the time it accepts assignment of servicing rights for a mortgage loan.<sup>51</sup> This detailed notice must include “any notice required by RESPA or by regulations promulgated thereunder,” a “schedule of the ranges and categories of its costs and fees for its servicing-related activities, which shall comply with North Carolina law and which shall not exceed those reported to the Commissioner [of Banks],” a notice to the Commissioner of Banks that the servicer is licensed by the Commissioner of Banks and that complaints about the servicer may be submitted to the Commissioner of Banks, and any notice required by the other North Carolina statutes, including the foreclosure statute, the mortgage satisfaction statute and the Mortgage Debt Collection and Servicing Act.<sup>52</sup>

Finally, and in keeping with the Servicing Act’s consumer protection purpose, a mortgage servicer in effect must negotiate in good faith with the borrower after a delinquency or default has

---

47. § 53-243.10(b).

48. § 53-243.10(b)(5).

49. The Commissioner of Banks has published this form and evidently now is requiring it of any party engaging in mortgage servicing activities in North Carolina. See North Carolina Commissioner of Banks, Information for Mortgage Servicers, [www.ncforeclosurehelp.org/mortgageservicers.aspx](http://www.ncforeclosurehelp.org/mortgageservicers.aspx) (last visited Feb. 5, 2009).

50. § 53-243.10(b)(4).

51. § 53-243.10(b)(6).

52. *Id.*

occurred. That is, in the event of a delinquency or default by the borrower, the mortgage servicer must act in good faith to inform the borrower of the facts concerning the loan and the nature and extent of the delinquency or default.<sup>53</sup> If the borrower replies, the mortgage servicer must negotiate with the borrower, subject to any of the servicer's duties and obligations under the mortgage servicing contract, to attempt a resolution or workout to the delinquency.<sup>54</sup>

### C. Prohibitions

The Servicing Act makes the Mortgage Lending Act's prohibitions on the actions of mortgage bankers and mortgage brokers applicable to mortgage servicers, including the failure to comply with fee restrictions in the usury laws, failing to act in good faith or fair dealing, improperly influencing any appraiser, and failing to comply with federal law.<sup>55</sup> The Servicing Act added no fewer than seven new prohibitions on mortgage servicers, which, in combination with the new requirements discussed above, create the strictest conduct standards on mortgage servicers in the country.

The prohibited conduct provisions still apply to entities that are "exempt persons" under the Mortgage Lending Act, including banks, credit unions and savings institutions.<sup>56</sup> This part of the Mortgage Lending Act, however, generally does not create a private right of action. In other words, only North Carolina governmental authorities are permitted, under the Mortgage Lending Act, as amended by the Servicing Act, to enforce these prohibitions. Consequently, financial institutions that enjoy federal preemption, including exclusive visitorial authority by federal banking regulators, should not be subject to enforcement of these extensive new restrictions by the Commissioner of Banks.<sup>57</sup>

---

53. § 53-243.10(b)(7).

54. *Id.*

55. § 53-243.11.

56. *See id.* (providing that the proscribed conduct applies to "any person in the court of any mortgage transaction").

57. *See supra* notes 43-44 and accompanying text.

The additional Mortgage Lending Act prohibitions and restrictions on “mortgage servicers” involve the mortgage servicer’s handling of “forced place insurance,” failure to reinstate a past due loan upon timely render of full payment, and failure to mail to the borrower, at least forty-five days before foreclosure is initiated, a detailed, itemized written notice of past due amounts, options other than foreclosure, contact information of the servicer and contact information of HUD-approved counseling agencies and for consumer complaints at the Commissioner of Banks.<sup>58</sup>

A mortgage servicer must timely make all escrow payments so as to ensure no late charges or “other negative consequences,” unless there are insufficient funds in escrow *and* the servicer has reasonable belief that “recovery of the funds will not be possible.”<sup>59</sup> In addition, a mortgage servicer must comply with Article 10 of Chapter 45 of the North Carolina General Statutes, the Debt Collection and Mortgage Servicing Act.<sup>60</sup>

#### D. *Delay of Foreclosure*

The most significant part of the Servicing Act in the current environment may be the Commissioner of Banks’ authority to delay foreclosure of any mortgage loan. The statute provides that the Commissioner of Banks may direct the Clerk of Superior Court (Clerk) to suspend any foreclosure proceeding for sixty days (by written notice to the Clerk) if the Commissioner of Banks has evidence that a material violation of law occurred in the origination or servicing of the subject defaulted loan, and that the violation would be sufficient in law or equity to affect the validity or enforceability of the underlying loan documents or the right to foreclosure.<sup>61</sup> The Commissioner of Banks is required to provide a copy of the notice to the Clerk and to the servicer, and to provide

---

58. § 53-243.11(17) to (21).

59. § 53-243.11(22).

60. § 53-243.11(16).

61. § 53-243.12(n); *see also* Act of Aug. 17, 2008, ch. 228, sec. 18, 2008 N.C. Sess. Laws \_\_\_ (codified at N.C. GEN. STAT. § 45-21.16B (2008) (containing corresponding amendments to the North Carolina foreclosure law that require the Clerk to suspend foreclosure proceedings upon the Commissioner of Banks’ request and establish procedures for notice and re-commencement of foreclosure procedures).

the servicer with an opportunity to cure the violation or rebut the evidence of the suspected violation. The Commissioner of Banks is required to notify the Clerk if the violation is cured or if satisfied that no material violation occurred so that the foreclosure may be resumed.<sup>62</sup> This authority appears to be in addition to and not in lieu of the Commissioner of Banks' power to impose a one-time thirty day foreclosure extension under the newly-enacted Emergency Foreclosure Reduction Program.<sup>63</sup>

For mortgage servicers generally subject to the Servicing Act, it appears that three to four month delays in residential foreclosures in North Carolina could become common. The first period of delay would arise under the forty-five day pre-foreclosure notice requirement in the Emergency Foreclosure Reduction Program,<sup>64</sup> and a second sixty-day period could be tacked on if the Commissioner of Banks believes that legal violations as to the origination or servicing of the loan may have occurred.<sup>65</sup> In fact, borrowers who become aware of the new law may use the forty-five day notice as a signal to contact the Commissioner of Banks with complaints that very well could lead to the sixty-day notice of suspension of foreclosure. Moreover, the sixty-day suspension may be available during any phase of the foreclosure process itself, even after a foreclosure sale has taken place. At this point, the Commissioner of Banks' only recourse could be to require a foreclosure trustee not to confirm the sale, which could cloud title and not provide a meaningful remedy to the borrower. These concerns may be tempered by the Servicing Act's requirement that mortgage servicers in the event of default or delinquency must act in good faith to inform borrowers of the nature and extent of the default and negotiate with any borrower to attempt a resolution or workout in respect of the default or delinquency. It may be that the Commissioner of Banks often will use the sixty-day delay to encourage mortgage servicers to fulfill

---

62. § 53-243.12(n).

63. N.C. GEN. STAT. § 45-105 (2008). See Waldrep, *supra* note 15.

64. N.C. GEN. STAT. § 45-102 (2008).

65. § 53-243.12(n).

their duties under this provision and to effectuate the “cure” referred to in the statute.<sup>66</sup>

#### IV. CONCLUSION

The Mortgage Lending Act, enacted in 2002, gave the Commissioner of Banks authority over mortgage lenders and brokers. The recently enacted Servicing Act amended the Mortgage Lending Act to extend this authority over mortgage servicers. The Servicing Act added licensing requirements for mortgage services, prohibitions on conduct for mortgage servicers, and the ability to delay foreclosure on certain mortgage loans. Consequently, the Servicing Act’s amendments to the Mortgage Lending Act once again make North Carolina policymakers trailblazers on the path to residential mortgage lending protection.

---

66. *See id.* (providing that “If the violation is cured or the information satisfies the Commissioner [of Banks] that no material violation has occurred, the Commissioner [of Banks] shall notify the Clerk so that the foreclosure proceeding may be resumed.”).

