UPDATE:

The North Carolina Mortgage Debt Collection and Servicing Act

In its 2007 session, the North Carolina legislature enacted the Mortgage Debt Collection and Servicing Act, codified at N.C.G.S. § 45-90 – 45-95. The Act became effective on April 1, 2008.[1] It imposes restrictions on loan servicers' assessment of fees and crediting of payments and requires loan servicers to provide certain information on loans upon borrower request. The Act's requirements apply generally to "home loans," which it broadly defines as loans secured by North Carolina real estate used or intended to be used as a dwelling, regardless of whether the loan is used to purchase or refinance the purchase of real estate.

With respect to fees assessed by loan servicers, the Act provides that any such fee, other than a foreclosure-related attorney or trustee fee, must be assessed within 45 days of the date on which the fee is incurred (the date the service generating the fee was performed). A foreclosure-related attorney or trustee fee must be assessed within 45 days of the date such a fee is actually charged to the servicer. Additionally, any servicer fee must be "clearly and conspicuously" explained in a statement mailed to the borrower within 30 days of the assessment; however, effective October 1, 2008, such a statement need not be mailed for a fee resulting from a service affirmatively requested by the borrower, paid for by the borrower at the time of service, and not charged to the loan account. If either of these requirements (timely assessment and adequate disclosure) is not satisfied, the fee cannot be collected.

The Act also requires loan servicers to accept and credit any payment within one day of receipt, if the payment constitutes a "full contractual payment" and the borrower provides sufficient information to credit the account. If the servicer uses the scheduled method of accounting, any payment made prior to the due date must be credited no later than the due date. Finally, all fees charged by servicers must be permitted by law *and* by the loan documents – thus unless allowed by the loan documents, servicer fees cannot be assessed against borrowers.

The Act also imposes requirements for responding to borrowers' requests for information about their loans. The Act requires servicers to respond in writing within 10 business days of receipt to a borrower's written request for basic account information, such as the current balance, and within 25 business days to written requests for more detailed materials, including copies of the original note and itemized statements of fees and charges. Each borrower is entitled to one such response from a servicer free of charge every six months. Finally, the Act requires servicers to promptly correct errors relating to the allocation of payments, the statement of account, or the payoff balance identified in any such statement.

A borrower injured by any violation of the Act may bring a civil action for actual damages and attorney's fees. In addition, the Commissioner of Banks, the Attorney General, or any party to a home loan may enforce the Act. Effective January 1, 2009, the Clerk of Court must suspend foreclosure proceedings on the relevant mortgage or deed of trust for 60 days if the North Carolina Commissioner of Banks notifies the Clerk of a violation by a servicer. The Act does provide servicers a safe harbor provision: if a failure to comply with the Act is not intentional and not the result of bad faith, and within 30 days of learning of the violation and before the commencement of legal proceedings the servicer corrects the error, the servicer will be deemed not to have violated the Act.

Other Statutory Changes

Rate Spread Home Loans

In its 2007 session, the North Carolina legislature enacted restrictions on "rate spread home loans," effective January 1, 2008. The Act, codified at N.C.G.S. § 24-1.1F, applies to any home loan with an annual percentage rate ("APR") of at least 3% higher than the yield on U.S. Treasury securities of comparable periods of maturity for loans secured by first mortgages or deeds of trust or at least 5% higher than the yield on such Treasury securities for junior

[1] The legislature has passed various clarifications to the language of the Act, and these clarifications are incorporated here when relevant. *See* H. 2188, 2008 Gen. Assem., Reg. Sess. (N.C. 2008) (effective Oct. 1, 2008); H. 2463, 2008 Gen. Assem., Reg. Sess. (N.C. 2008) (relevant portions effective Jan. 1, 2009).

mortgage and deed of trust loans. The Act also applies to any home loan with an APR of at least 1.75% higher than the "conventional mortgage rate" for first mortgage and deed of trust loans or at least 3.75% higher than the conventional mortgage rate for junior mortgage and deed of trust loans. The Act prohibits prepayment penalties on rate spread home loans and requires lenders to carefully analyze borrowers' ability to repay rate spread home loans. The Act declares rate spread home loans made in violation of its provisions to be usurious. The Act contains safe harbor provisions for lenders, including a provision protecting lenders that fail in good faith to comply with its terms, but notify the borrower, make appropriate restitution, and take other corrective action within 90 days of the loan closing and before institution of legal action.

Statute of Limitations for Usury Claims

In its 2007 session, the North Carolina legislature amended N.C.G.S. § 1-53(2), effective August 16, 2007, to overrule the North Carolina Supreme Court's decision in *Shepard v. Ocwen Federal Bank, FSB*, 361 N.C. 137 (2006), that a claim for application of a usurious fee was barred after two years from the making of the loan. The new law provides that such claims accrue with each payment made and accepted on the loan.

Personal Jurisdiction Over Holders of Notes Secured By Liens on N.C. Property

In its 2007 session, the North Carolina legislature amended N.C.G.S. §§ 1-75.4(6) and 24-2.1, effective August 16, 2007, to address the North Carolina Supreme Court's decision in *Skinner v. Preferred Credit*, 361 N.C. 114 (2006), that holding a note secured by a deed of trust on North Carolina real estate did not subject the holder to personal jurisdiction in North Carolina. The new laws provide that persons acquiring the right to receive payments on loans made to North Carolina residents primarily for personal, family, or household purposes and secured by North Carolina real estate are subject to personal jurisdiction in North Carolina.

DISCLAIMER

This document contains general information regarding recent changes to North Carolina law and is not intended to serve as and does not constitute legal advice. For more information regarding the legal issues addressed in this document, please contact the Consumer Lending Litigation attorneys at Robinson, Bradshaw & Hinson, P.A.:

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