House Bill No. 64

summary of amendments; new statutory sections

MCCCDA - G.L. c. 140D, s. 10:

Clarifies what happens upon a lawful loan rescission under the Massachusetts Consumer Credit Cost Disclosure Act (" MCCCDA") by a borrower – such rescission must be affirmatively accepted or rejected by the creditor within 20 days.

Extends statute of limitations on MCCCDA (TILA) claims – including the right to rescind a loan transaction - to six (6) years where MCCCDA claims were not discovered by a borrower until the four (4) year statute of limitations had run.

Comment: Currently, many borrowers do not realize that they have been the victim of violations of the MCCCDA in their loans. Extension of the right to rescind will allow borrowers time to examine any claims they may have.

If rescission is rejected, it is the creditor's obligation to file an action with a court to seek a determination of the rights of the parties, not the borrower.

Comment: Currently the onus is on the borrower – the party most poorly positioned to bring an action to enforce a purported rescission – to seek enforcement of a rescission. Many servicers simply ignore rescission requests leaving the borrower to bear the expense of bringing a Superior Court or other action to attempt to enforce a rescission.

MCCCDA - G.L. c. 140D, s. 33:

Removes avoidance of liability for improper disclosures (erroneous or deceptive calculations of interest rates, fees, etc.) for "assignee's" of a mortgage obligation.

Comment: Currently, an "assignee" (perhaps 70-80% of all residential loans have been "assigned" in the last decade) can avoid liability for any problems with the loan unless such problems are "apparent on the face" of the documents. Where the loan originator has failed or gone into bankruptcy and is no longer in existence, the borrower is left with no recourse at all against any party for violations of the law in their loan. Typically, errors in the calculation of interest rates and fees would only be "apparent on the face of the documents" if an assignee reviewed the loan for errors before accepting the assignments. Assignees however disclaim this obligation in court's and are consequently avoiding any liability for the bad acts of their now-out-of-business predecessors. The assignee – typically a sophisticated banking institution, is obviously in a better position to examine loans that they are buying for errors than a borrower who has no such specialized knowledge.

Requires a standard of review of a borrower's claims under MCCCDA as "least sophisticated consumer" as it is under the Fair Debt Collection Practices Act.

Comment: Currently the First Circuit courts have held that the standard of review for an MCCCDA claim is the "average" consumer on an "objective" basis. This holds an often un-

represented and unsophisticated borrower in a complicated mortgage transaction to a much higher standard of knowledge of complex and confusing mortgage products than a consumer who is challenging an unsecured credit card debt. This is unfair and inequitable. It is common knowledge that during the boom years, borrowers – often unrepresented by their own counsel – were steamrolled into signing sometimes 100's of documents at real estate closings with very little knowledge of the legal effect of those documents and whether they were accurate. In reviewing claims brought by consumers under MCCCDA, courts should be reviewing these claims using the same standard as that that is used under the FDCPA. To hold a borrower to a lower standard of knowledge for unsecured debts like credit cards, the terms and conditions of which are easily disclosed, while holding them to a much higher standard in a residential real estate transaction where they would need specialized knowledge or affirmative legal representation to understand all the terms and conditions of their loan obligation(s), is unfair and inequitable.

Requires servicer or lender to provide ALL documents associated with the underlying loan (including any securitization documents) to borrower within 60 days of written request at no charge to borrower.

Comment: Currently loan servicers, upon written request (a "Qualified Written Request" or "QWR" under 12 U.S.C. 2501(e)) provide only minimal documentation of a borrower's loan documents and strenuously object to providing detailed information about the loan transaction and the sale and transfer of the borrower's loan obligation - all of which are in the possession of the servicer and often hidden from the borrower's knowledge since many borrowers' loans (under the MERS system) are bought and sold without their knowledge). Many borrowers receive only unexecuted copies of documents at closing leaving them without any evidence of the transaction. Many servicers also attempt to charge borrowers for copies of documents that they executed – even though no executed copies were ever provided to them at any closing. Some charge as much as $5.00 per page. Borrowers should be entitled to get ALL copies of documents and FULL disclosure of everything related to the ownership of their loan, without charge, upon written request.

The Recording Statute - G.L. c. 183, s. 4

Requires all assignments of mortgage in Massachusetts to be recorded to be valid.

Comment: This addresses the concern of the existence of unrecorded mortgage assignments and the inability for borrowers or third party purchasers to easily determine who the current mortgage holder is by reviewing the public land records. It also helps to eliminate the issues raised by the creation of fraudulent documents created years after a transaction in an effort to "correct" a transaction that was not properly recorded at the time of the transaction.

Acknowledgements – G.L. c. 183, s. 30

Requires all notaries and notary acknowledgments to comply with all of the requirements laid down by the governor of the Commonwealth and all notary acknowledgments to be completely filled out and properly executed in all respects.

Comment: This addresses concerns raised by improperly executed or incomplete notary acknowledgments and provides a simple, uniform standard for all notaries to follow.

Assignments of Mortgage – G.L. c. 183, s. 54B

Requires all assignments of mortgage (and certain other documents) to be executed by a person with actual knowledge under the pains and penalties of perjury and that any corporate authority be evidenced therewith.

Comment: This corrects issues associated with the crisis created by the "robo-signing" of documents by individuals or entities without evidence of their authority to sign or their knowledge as to what they are signing that have corrupted the public land records nationwide and in the Commonwealth.

New Section G.L. c. 183, s. 6

Will not allow mortgages to be recorded on the public land records where the mortgagee is identified as anyone other than the present lender and present holder of the mortgage.

Comment: This eliminates the ability of electronic databases such as Mortgage Electronic Registration Systems, Inc. (MERS) to usurp the public land records, avoid required recording fees, and "hide" the true ownership of a borrower's loan by eliminating the ability of a "nominee" to act on behalf of a lender in recorded mortgages.

New Section G.L. c. 244, s. 14B

Defines a "mortgagee" as (i) the current holder of the mortgage by assignment or otherwise, and (ii) the current holder in due course of the underlying debt (the note).

Requires that for a foreclosure to be valid in MA, it must be conducted by the current mortgagee as defined above.

Comment: This eliminates the confusion created by the "splitting" or "bifurcation" of the note and mortgage with either or both being held in separate ownership as well as the confusion created by loan servicers foreclosing in their own names where the debt obligation – unbeknownst to the borrower - may reside with an "investor" or other entity.